Supreme Court U.S.
FILED
2003 DEC 5
OFFICE OF THE CLERK

NO. 03-836

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO,

PETITIONER,

vs.

WADE MILLER,

RESPONDENT.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

PETITION FOR A WRIT OF CERTIORARI

Edward J. Rogers, III
District Attorney
Eleventh Judicial District
Catherine P. Adkisson*
Special Deputy
District Attorney
Paul E. Koehler
Special Deputy
District Attorney
1525 Sherman St. 5th Floor
Denver CO 80203
Telephone (303) 866-5584
** Counsel of Record*

December 1, 2003

68 pp

QUESTIONS PRESENTED

1. Whether the Colorado court misapplied the staleness doctrine of the Fourth Amendment in finding that evidence concerning an ongoing drug manufacturing operation was "stale" because it was almost one month old.

2. Whether the Colorado Supreme Court eviscerated Leon by finding that the good faith exception to the exclusionary rule generally does not apply when an appellate court finds, under Gates, that there was an insufficient basis for the warrant.

TABLE OF CONTENTS

PAGE

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE FACTS 2

STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTION WAS RAISED 3

THE DECISION OF THE COLORADO SUPREME COURT 3

REASONS TO ISSUE THE WRIT
SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. Whether the Colorado court misapplied the staleness doctrine of the Fourth Amendment in finding that evidence concerning an ongoing drug manufacturing operation was "stale" because it was almost one month old. 6

II. Whether the Colorado Supreme Court eviscerated Leon by finding that the good faith exception to the exclusionary rule generally does not apply when an appellate court finds, under Gates, that there was an insufficient basis for the warrant. 12

CONCLUSION 17

APPENDIX A a1- a31
APPENDIX B b1- b9
APPENDIX C ..... c1 - c4

TABLE OF AUTHORITIES

PAGE

CASES

Aguilar v. Texas, 378 U.S.108 (1964) 4, 6

Andresen v. Maryland, 427 U.S. 463 (1976) 9

Berger v. New York, 388 U.S. 41 (1967) 9

Caucon v. United States, 824 F.2d 9089 (11th Cir. 1987) 10

Illinois v. Gates, 462 U.S. 213 (1983) ..... passim

Lovett v. Commonwealth, 103 S.W.3d 72 (Ky. 2003) 10

Mapp v. Ohio, 367 U.S. 643 (1961) 12

People v. Altman, 960 P.2d 1164 (Colo. 1998) 4

People v. Gall, 30 P.3d 145 (Colo. 2001) 4

People v. Leftwich, 869 P.2d 1260 (Colo. 1994) 4, 14

People v. Miller, 75 P.3d 1108 (Colo. 2003) ..... passim

People v. Pannebaker, 714 P.2d 904 (Colo. 1986) 7

People v. Randolph, 4 P.3d 477 (Colo. 2000) 4

Sgro v. United States, 287 U.S. 206 (1932) 8

Spinelli v. United States, 393 U.S. 410 (1969) 4

State v. Baker, 103 S.W.3d 711 (Mo. 2003) 10

State v. Hage, 568 N.W.2d 741 (N.D. 1997) 10

United States v. Cardall, 773 F.2d 1132 (10th Cir. 1985) 15, 16

United States v. Harris, 403 U.S. 573 (1971) 9

United States v. Hove, 848 F.2d 137 (9th Cir. 1988) 16

United States v. Leasure, 319 1092, 1099 (9th Cir. 2003) 10

TABLE OF AUTHORITIES

PAGE

United States v. Leon, 468 U.S. 897 (1984) ..... passim

United States v. McKneely, 6 F.3d 1447 (10th Cir. 1993) 15, 16

United States v. Ruff, 984 F.2d 635 (5th Cir. 1993) 10

United States v. Sturmoski, 971 F.2d 452 (10th Cir. 1992) 10

United States v. Tisdale, 248 F.3d 964 (10th Cir. 2001) 15

Weeks v. United States, 232 U.S. 383 (1914) 12

STATUTES

28 U.S.C. §1257(a) 1

RULES

Colo. R. App. P. 4.1(g) 1

Sup. Ct. R. 10(b) 11

Sup. Ct. R. 10(c) 11

OTHER AUTHORITIES

2 Wayne R. LaFave, Search & Seizure, § 3.7(a), pp. 338-355 (3d ed. 1996 & 2004 Supp.) 9

Drug Enforcement Administration, Intelligence Report, "Chemical Diversion and Synthetic Drug Manufacture" (Jan. 2002) 8

Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On, 100 A.L.R.2d 525-544 (1965) 9

TABLE OF AUTHORITIES

PAGE

When are Facts Offered in Support of a Search Warrant for Evidence of Sale or Possession of Cocaine so Untimely as to be Stale—State Cases, 109 A.L.R.5th 99-160 (2003).....9

OPINION BELOW

The Colorado Supreme Court opinion, which is attached as Appendix A, has been reported as People v. Miller, 75 P.3d 1108 (Colo. 2003). The search warrant and its affidavit, and the trial court's order suppressing the evidence seized pursuant to the warrant are attached as Appendices B and C.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(a). This petition involves an interlocutory appeal of an order suppressing evidence seized by law enforcement officers who were executing a search warrant that had been approved by a judge. The Colorado Supreme Court affirmed the trial court's suppression order on September 8, 2003. No petition for rehearing is permitted in such cases under Colorado appellate rules. Colo. R. App. P. 4.1(g).

CONSTITUTIONAL PROVISIONS

Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendment XIV, section 1 of the United States Constitution provides, in pertinent part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE FACTS

Wade Miller faces Colorado felony charges for possessing and operating two separate methamphetamine laboratories within Fremont County, Colorado, on January 6, 2003. These laboratories were located at Miller's residence at 406 Riverside, Canon City (Riverside), and at his friend Jacob Lopez' mobile home located at 926 Orchard, Unit C, in unincorporated Fremont County (Orchard).

Based on information from fellow officers and several informants that Miller and Lopez had been manufacturing methamphetamine at both locations as recently as a month before the affidavit was prepared, officers from the Canon City Police Department (Officer Andrew Lopez) and the Fremont County Sheriff's Department (Deputy Mike Jolliffe) obtained search warrants for both the Riverside and Orchard addresses.[1]

Both warrants were signed by Fremont County Judge William Fox on January 6, 2003. The search warrant for the mobile home at 926 Orchard was executed on January 6, 2003, and police found items consistent with manufacturing methamphetamine. The search warrant for Miller's residence at 406 Riverside was executed later the same day, and yielded a "cold" methamphetamine laboratory in the residence. Miller was present in his residence when the search warrant was executed and was thereafter taken into custody.

---

[1] The search warrant affidavits for the Riverside and Orchard locations were substantially the same. Inexplicably, the Orchard affidavit contained an additional bit of information about the Riverside location that was more current than what was provided in the affidavit at issue here. See Miller, 75 P.3d at 1111.

STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTION WAS RAISED

Prior to trial, Miller moved to suppress the fruits of the Riverside search. The district court granted the motion, finding that the underlying affidavit failed to establish probable cause because it was based on stale information. The trial court further declined to apply the good faith exception to the exclusionary rule.

THE DECISION OF THE COLORADO SUPREME COURT

On interlocutory appeal, the Colorado Supreme Court affirmed the suppression order. Miller, 75 P.3d 1108 (Pet. App. A). The Court concluded that the information provided in the affidavit for the search warrant was "stale" and thus insufficient, Id. at 1115, and held that the good faith exception to the exclusionary rule under Leon did not apply because no reasonable officer would have relied on a warrant based on such stale information. Id. at 1116-1117. Three justices vigorously dissented, arguing that the information at issue was not stale given the ongoing nature of Miller's methamphetamine manufacturing activities, and that, in any event, the officers relied on the warrant in good faith, and thus the evidence at issue should be admissible. Id. at 1117-1119.

REASONS TO ISSUE THE WRIT SUMMARY OF THE ARGUMENT

This Court's decisions in Illinois v. Gates, 462 U.S. 213, 236 (1983), and United States v. Leon, 468 U.S. 897 (1984), made substantial changes in Fourth Amendment doctrine. Because Colorado has been reluctant to embrace these changes, and because this reluctance is impacting the ability of Colorado law enforcement agencies to combat a proliferation of methamphetamine-manufacturing sites, this

Court should review the Colorado Supreme Court's opinion in Miller.

In Gates, this Court abandoned the highly technical, two-pronged Aguilar-Spinelli[2] analysis for determining probable cause, and returned to a more practical and common sense totality-of-the-circumstances approach. In Leon, this Court recognized a good faith exception to the exclusionary rule, under which evidence obtained by police acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be unsupported by probable cause, would not be barred from use at trial.

In spite of these significant changes in Fourth Amendment law, the Colorado Supreme Court has provided little guidance to the Colorado law enforcement community regarding what is necessary to establish probable cause in the investigation of continuing illegal enterprises, and whether, notwithstanding allegedly debatable probable cause, a search may nonetheless be held valid because the officers conducting it were acting in good faith. In the past ten years, the Colorado Court has issued inconsistent opinions which have muddied the waters of probable cause and unduly restricted the application of the good faith exception. Compare, e.g., People v. Gall, 30 P.3d 145 (Colo. 2001) (search upheld notwithstanding errors in affidavit) and People v. Altman, 960 P.2d 1164 (Colo. 1998) (affidavit defective, but good faith exception applied), with People v. Randolph, 4 P.3d 477 (Colo. 2000) (search invalidated because of insufficient specificity in warrant; no good faith exception) and People v. Leftwich, 869 P.2d 1260 (Colo. 1994) (search invalidated; no good faith exception). These decisions conflict not only with each other, but also with

---

[2] Aguilar v. Texas, 378 U.S.108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969).

decisions from many other courts that have properly applied the holdings of Gates and Leon.

Dealing as it does with the growing national problem of methamphetamine-manufacturing, this case provides a fitting opportunity for this Court to clarify for courts throughout the country how the concept of staleness relates to probable cause and continuing enterprises, and, at the same time, to clarify the relationship of Gates to the good faith exception to the exclusionary rule under Leon.

The Colorado Court's approach to staleness and its inconsistent view of the applicability of the good faith exception exacts an unjustifiable cost to society. Reliable evidence of criminal culpability is often kept from the fact-finder through an overly rigid approach to the determination of probable cause, and officers acting in good faith are penalized because of an inappropriately aggressive application of the exclusionary rule, potentially leading to the dismissal of criminal cases. Miller holds that, if a bare majority of the highest court concludes there is no probable cause, then necessarily no reasonable police officer could have thought otherwise (notwithstanding that the trial judge who issued the Miller warrant and three state Supreme Court justices thought the affidavit was sufficient). The Writ should issue to correct the Colorado Court's unrealistic view of "staleness," and to correct its often-inconsistent approach to probable cause and good faith under Gates and Leon.

ARGUMENT

I. Whether the Colorado court misapplied the staleness doctrine of the Fourth Amendment in finding that evidence concerning an ongoing drug manufacturing operation was "stale" because it was almost one month old.

In Gates, this Court rejected the Aguilar-Spinelli standard and returned instead to the "totality of the circumstances analysis that traditionally has informed probable-cause determinations." Gates, 462 U.S. at 238. Gates refocused the determination of probable-cause into a common sense, practical inquiry: "[t]he focus should be on 'probabilities' which are 'not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Gates, 462 U.S. at 230-231.

This Court emphasized in Gates that "probable cause is a fluid concept -- not readily, or even usefully, reduced to a neat set of legal rules...The essential protection of the warrant requirement of the Fourth Amendment ... is in 'requiring that [the usual inferences which reasonable people draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" Gates, 462 U.S. at 240.

The probable cause/staleness analysis employed by the Colorado Supreme Court in Miller is in stark contrast to the common-sense approach established by this Court in Gates. While the Miller Court paid lip service to the practical principles set forth in Gates and adopted by Colorado in People v. Pannebaker, 714 P.2d 904 (Colo.

1986), it ignored the totality of the circumstances and applied an idiosyncratic, erroneous evaluation of staleness.

The Colorado Supreme Court dissected the information upon which the judge had approved the warrant and summarily rejected the affidavit as based on "stale" information. Instead of considering whether the information as a whole "warrant[ed] suspicion" or demonstrated the "probability" of ongoing criminal activity at Miller's Riverside address, the Court imposed a rigid (and apparently arbitrary) time line for determining probable cause. The Court thereby rejected the "nontechnical and common sense judgments" which this Court has said should underlie probable cause determinations for both police and magistrates. Gates, 462 U.S. at 235-236.

Here, under the totality of the circumstances, there was a substantial basis upon which the judge issued the warrant. Officer Lopez' probable cause affidavit for the search of 406 Riverside established a nexus between Miller's criminal activity (manufacturing methamphetamine) and his residence at 406 Riverside. Miller had been arrested on August 14, 2002, after a search of the residence yielded a "meth lab." On that same day, Officer Lopez arrested Miller's friend, Jacob Lopez, after Jacob Lopez approached Miller's residence with methamphetamine and drug paraphernalia on his person. Miller was free on bond at the time of the January 2003 search, but had reportedly been continuing his manufacturing activities with Jacob Lopez both at his own home, and at Lopez' mobile home. Pet. App. B.

The Colorado Court did not, however, consider the totality of these circumstances. Instead, the Court summarily rejected the warrant on the ground that the most recent information in it was almost a month old and therefore

"stale." The Court applied a technical, legalistic analysis, not a practical one based on a common sense approach to probability.

This case presents a significant issue concerning the staleness doctrine of the Fourth Amendment as it applies to the investigation of continuing criminal enterprises, in particular, the manufacture or production of controlled substances. Although mentioned in passing in only a few of this Court's cases (but addressed as a significant issue in many lower court opinions), this Court has yet to provide guidance to the lower courts on when information contained in a warrant affidavit becomes so stale as a matter of federal constitutional law that it cannot be considered in support of a probable cause to search determination. In light of the increasing use of chemical processes to manufacture controlled substances,[3] this is an issue of current and continuing legal concern that merits this Court's consideration.

The only significant guidance this Court has ever provided on the issue of when evidence is so stale that it cannot be used to find probable cause occurred more than seventy years ago in Sgro v. United States, 287 U.S. 206 (1932). In Sgro, concerning the search warrant provision of the National Prohibition Act, this Court wrote:

> While the statute does not fix the time within which proof of probable cause must be taken

---

[3] See Drug Enforcement Administration, Intelligence Report, "Chemical Diversion and Synthetic Drug Manufacture" (Jan. 2002) available at http://www.usdoj.gov/dea/pubs/intel/intel010621.html).

> by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.

Id. at 210-11 (emphasis added).

Since then, this Court has addressed search warrant staleness claims only in passing, without providing any guidance to the lower courts on how to address the issue. See Andresen v. Maryland, 427 U.S. 463, 478 n. 3 (1976); United States v. Harris, 403 U.S. 573, 579 n.* (1971); Berger v. New York, 388 U.S. 41, 59 (1967).

Lower courts, on the other hand, address claims concerning the staleness of search warrants on a frequent basis. See 2 Wayne R. LaFave, Search & Seizure, § 3.7(a), pp. 338-355 (3d ed. 1996 & 2004 Supp.); Annotation, When are Facts Offered in Support of a Search Warrant for Evidence of Sale or Possession of Cocaine so Untimely as to be Stale—State Cases, 109 A.L.R.5th 99-160 (2003) ; Annotation, Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On, 100 A.L.R.2d 525-544 (1965).

Inexplicably, the Colorado Supreme Court held that "nearly a month" delay between the last time the informant reported that the defendant had manufactured methamphetamine in his residence and the search warrant application for that location rendered the informant's report stale as a matter of federal constitutional law, characterizing

it as an "excessive delay . . . [that] renders the information stale and unreliable." Miller, 75 P.3d at 1114.

Federal circuit courts of appeals and state courts of last resort faced with longer --sometimes substantially longer -- periods of time between affidavit evidence and warrant applications have rendered decisions that conflict with the one in this case. They hold that when the crime at issue involves the investigation of conspirators involved in the clandestine production of controlled substances involving lengthy investigation, "staleness arguments lose much of their force." United States v. Leasure, 319 1092, 1099 (9th Cir. 2003) (meth lab information that was six months old was not stale); United States v. Ruff, 984 F.2d 635, 638 (5th Cir. 1993) (meth lab information that was two and a half months old was not stale); United States v. Sturmoski, 971 F.2d 452, 456-57 (10th Cir. 1992) (meth lab information that was six months old was not stale); Caucon v. United States, 824 F.2d 9089, 911 (11th Cir. 1987) (meth lab information that was eleven months old was not stale); Lovett v. Commonwealth, 103 S.W.3d 72, 80 (Ky. 2003) (meth lab information that was two months old was not stale); State v. Baker, 103 S.W.3d 711, 720 (Mo. 2003) (meth lab information that was fourteen months old was not stale); State v. Hage, 568 N.W.2d 741, 744 (N.D. 1997) (meth lab information that was four months old was not stale).

The three dissenting justices of the Colorado Supreme Court urged the court to follow that line of reasoning. See Miller, 75 P.3d at 1118-19 (Coats, J., dissenting). As the dissent observed, "The majority's decision to limit the life-span of probable cause to a set number of days following the last information of drug manufacturing at a particular location is not only contrary to our prior holdings but fails to appreciate the significance of being a continuing and ongoing operation." Id. at 1119. The Colorado Supreme Court decision in this case thus conflicts

with decisions of other state courts of last resort and with decisions of United States courts of appeals. See Sup. Ct. R. 10(b).

This Court wrote in Gates that, when determining the existence of probable cause,

> [a] grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than commonsense manner.

Gates, 462 U.S. at 236. The Colorado Supreme Court's opinion in this case reflects a grudging, negative, hypertechnical standard of review for probable cause determinations that is at odds with the standard set forth in Gates. The decision in this case thus conflicts with a relevant decision of this Court. See Sup. Ct. R. 10(c).

The Miller decision also forces Colorado law enforcement officers conducting complex drug manufacturing/conspiracy investigations tc seek warrants shortly after receiving information of criminal activity from informants. Here, although the Miller Court recognized that the investigating officers were collecting evidence concerning other aspects of the defendant's methamphetamine manufacturing scheme during the "nearly a month delay," Miller, 75 P.3d at 1115, the Court factored the officers' painstaking investigation against the validity of the warrant they sought. Miller thus effectively penalizes law enforcement officers for seeking evidence from multiple

sources and conducting meticulous investigations that could confirm, or possibly refute, information provided by informants.

The time needed to conduct complex investigations into possibly wide-ranging drug production organizations -- investigations that are sometimes conducted by local law enforcement agencies with limited resources -- should reasonably cause staleness claims to be predicated on extremely long periods of time, periods much longer than the "nearly a month" delay held to violate the Fourth Amendment in this case. The result of the Colorado Supreme Court's ill-advised decision in this case will be to hinder legitimate investigations into complex drug manufacturing conspiracies and to reduce the fact-finding accuracy of criminal trials. This Court should grant certiorari review on this issue to correct this significantly inappropriate probable cause analysis.

II. Whether the Colorado Supreme Court eviscerated Leon by finding that the good faith exception to the exclusionary rule generally does not apply when an appellate court finds, under Gates, that there was an insufficient basis for the warrant.

In Leon, this Court continued its common sense modification of search and seizure law by holding that court-created rules requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment[4] should be modified to allow for the admission of evidence

---

[4] Mapp v. Ohio, 367 U.S. 643 (1961), and Weeks v. United States, 232 U.S. 383(1914).

obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Because the exclusionary rule is designed to deter constitutional violations by the police, there is generally no police illegality (and thus nothing to deter) when an officer acting with objective good faith executes a search warrant issued by a neutral magistrate. As such, this Court recognized in Leon that excluding the evidence so obtained does not "further the ends of the exclusionary rule in any appreciable way." Leon, 468 U.S. at 920.

The Court did not, however, open a Pandora's box of constitutional violations with this new pronouncement. Even under this relaxed standard, this Court recognized four situations where an officer's reliance on a warrant would not be objectively reasonable and therefore not in good faith:

- where a facially sufficient affidavit is based upon knowingly or recklessly made falsehoods;
- where the issuing magistrate wholly abandoned his judicial role;
- where the warrant is so lacking in specificity that the officers could not determine the place to be searched or the things to be seized; and
- where the affidavit is so lacking in indicia of probable cause that official belief in its existence is unreasonable, i.e., the affidavit is a "bare bones" affidavit.

Leon, 468 U.S. at 923.

In Miller, the Colorado Supreme Court misapplies the fourth of these exceptions. The Miller court relied on the dissent in Leon (and not on the majority opinion) to

intermingle the Gates standard for reviewing a probable cause determination with Leon's holding that the good faith exception to the exclusionary rule cannot apply if an affidavit is "bare bones." The Court then made a titanic leap in reasoning, concluding that "in the vast majority of cases, if a court [applies Gates and] finds a lack of probable cause, the court will reach the conclusion that the officer unreasonably relied on the affidavit." Miller, 75 P.3d at 1115-1116, citing People v. Leftwich, 869 P.2d 1260, 1271, n. 12 (Colo. 1994). This conclusion is completely contrary to the reasoning and holding of Leon itself, in which this Court repeatedly emphasized that suppression will rarely be appropriate when a search is done pursuant to a warrant that is subsequently invalidated.

Under the Colorado Court's approach, the suppression of evidence, which was to be rare and unusual under Leon, will be the norm whenever a previously-approved search warrant is invalidated – even where, as here, reasonable minds differ on the sufficiency of the underlying affidavit.

The probable-cause prong of the good faith analysis presupposes a situation in which a warrant approved by a judge is subsequently found lacking in probable cause. Because it is axiomatic that there must be a probable cause issue before the good faith exception comes into play, it cannot also be, as the Miller Court said, that in "the vast majority of cases" that very same failure to establish probable cause almost automatically makes the good faith exception inapplicable. Miller, 75 P.3d at 1115-1116.

The Miller Court rejected the good faith exception because "the affidavit in this case is a 'bare bones' affidavit regarding the existence of the crucial link between the place

to be searched and current information of criminal activity or the presence of contraband there." Miller, 75 P.3d at 1116. The Court found further that "the police did not reasonably rely on the warrant" because "[a] reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence." Id. at 1116.

The Miller Court erroneously equated an allegedly defective probable cause affidavit with a "bare bones" affidavit. "Bare bones," however, has a far narrower meaning. An appellate court reviewing the reasonableness of an officer's reliance upon a search warrant must examine the underlying documents to determine whether they are devoid of factual support. United States v. Tisdale, 248 F.3d 964, 972 (10th Cir. 2001).

The test for "reasonable reliance" is whether the underlying documents are "devoid of factual support, not merely whether the facts they contain are universally recognized as legally sufficient." United States v. McKneely, 6 F.3d 1447, 1454 (10th Cir. 1993). It is only when an officer's reliance was wholly unwarranted that good faith is absent. United States v. Cardall, 773 F.2d 1132, 1133 (10th Cir. 1985).

"Leon has established for judicial consideration a framework for judging law enforcement activity which leads to a more precise application of the exclusionary rule. Leon balances individual rights with the equally important right of the public to bring to justice those who transgress the law. The balancing is predicated upon the concern that 'indiscriminate application of the exclusionary rule ... may well generat[e] disrespect for the law and the administration of justice' ... As a consequence of this concern, the Court

has mandated restraint upon exclusion of evidence to the end that evidence be suppressed only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." Cardall, 773 F.2d at 1132-1133. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Leon, 468 U.S. at 92.

"[P]olice officers should be entitled to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good faith for either seeking or executing a warrant" particularly where, "with the benefit of hindsight and thoughtful reflection, reviewing judges still cannot agree on the sufficiency of the affidavit." United States v. Hove, 848 F.2d 137, 139 (9th Cir. 1988) ("The test for reasonable reliance is whether the affidavit was sufficient to 'create disagreement among thoughtful and competent judges as to the existence of probable cause.'"). McKneely, 6 F.3d at 1454-1455, quoting Leon, 468 U.S. at 926). That principle is squarely at issue here, where the judge who issued the warrant and three justices of the Colorado Supreme Court found that the affidavit established probable cause.

It is the role of the neutral magistrate, not the police, to make the ultimate probable cause determination. However, that is a determination on which reasonable people can frequently differ. Leon, 468 U.S. at 914 (citations omitted). It therefore makes no sense to suppress evidence and let the criminal go free in a situation where reasonable (and frequently highly-trained) minds can differ on whether facts rise to the level of probable cause. To suppress the use of reliable inculpatory evidence, even though law enforcement authorities acted as carefully as they did here, can only serve to promote more hasty action in the future in order to avoid the specter of staleness – often sacrificing the

benefits to be gained by a complete and thorough investigation.

Here, in addition to the significant information contained in the affidavit, other information available to the trial court and the Colorado Supreme Court clearly established that the investigating officers were acting in good faith. A comparison of the probable cause affidavits for the Orchard and Riverside locations clearly reflects that the two officers shared information and worked together in composing their affidavits. The officers executed the search warrant for Miller's Riverside residence only after they had conducted the Orchard search and seizure, and after they found items consistent with manufacturing methamphetamine that corroborated the statements of the informants.

The ongoing police investigation into Miller's activities, when viewed under the totality of the circumstances, supported the officers' belief (and the issuing judge's conclusion) that Miller was manufacturing methamphetamine at his home and at other locations in January 2003. It was thus reasonable to infer that evidence of methamphetamine production would likely be found in Miller's house. Miller, 75 P.3d at 1118 (Coats, J. dissenting). Thus, even assuming arguendo that the affidavit at issue failed to establish probable cause, the good faith exception recognized in Leon should have applied.

CONCLUSION

As the dissenting justices noted, "the Fourth Amendment has never been construed to assign a life-span to information disclosing the commission of a crime" particularly where, as here, the case involves criminal activity of a protracted or continuous nature. Miller, 75 P.3d at 1117, Coats, J. dissenting. Courts throughout the country

routinely rely on information several months old in upholding convictions in cases involving ongoing drug sales and production. Id. at 1118, Coats, J. dissenting. Unless police have the opportunity to conduct long-term investigations into ongoing drug manufacturing operations -- and to rely on the cumulative information gathered in those operations without fear that information gained early in the investigation might be found to be "stale" -- law enforcement authorities will be severely hampered in their efforts to stop such activities.

The inconsistency with which the Colorado Supreme Court has applied both Gates and Leon has had a drastic effect on the determination of the validity of search warrants and on the application of the exclusionary rule in Colorado. The result is a continuation of the overly-technical approach to probable cause which this Court found inappropriate in Gates, compounded by the application of the exclusionary rule under circumstances which this Court found inappropriate in Leon. This will hamper law enforcement investigations into ongoing offenses, and lead to the dismissal of criminal cases in spite of possession of reliable incriminating evidence and in spite of the lack of any deterrent effect of that drastic remedy on the police.

The writ should issue to review and correct these errors, and thereby prevent the substantial social costs exacted by the Colorado Supreme Court's approach to staleness, probable cause, and the exclusionary rule. This 4-3 decision has far-reaching impact on the ability of Colorado law enforcement authorities to investigate ongoing criminal activity, and on the applicability of the good-faith exception to the exclusionary rule when officers act pursuant to a facially valid warrant.

Respectfully submitted,

Edward J. Rogers, III
District Attorney
Eleventh Judicial District
Catherine P. Adkisson*
Special Deputy
District Attorney
Paul E. Koehler
Special Deputy
District Attorney
1525 Sherman St. 5th Floor
Denver CO 80203
Telephone (303) 866-5584
* *Counsel of Record*

APPENDIX A

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Interlocutory Appeal from the Fremont County District Court, Case No. 03CR11 Honorable Julie G. Marshall, Judge	Case No. 03SA107
Plaintiff-Appellant: THE PEOPLE OF THE STATE OF COLORADO, v. **Defendant-Appellee:** WADE PAUL MILLER.	
ORDER AFFIRMED EN BANC **September 8, 2003**	

Edward J. Rogers, District Attorney
Kathleen G. Eberling, Assistant District Attorney

Canon City, Colorado
Attorneys for Plaintiff-Appellant

Josh T. Liles
Salida, Colorado
Attorney for Defendant-Appellee

JUSTICE HOBBS delivered the Opinion of the Court.
JUSTICE COATS dissents, and JUSTICE KOURLIS and

JUSTICE RICE join in the dissent.

In this interlocutory appeal, filed pursuant to C.A.R. 4.1 and section 16-12-102(2), 6 C.R.S. (2002), the prosecution appeals the district court's order suppressing evidence of methamphetamine manufacture seized from defendant Wade Miller's home. Nearly a month expired between the event the informant related and application by the police for the warrant. The trial court set aside the warrant for lack of probable cause and suppressed the evidence seized--for lack of good faith police reliance on the sufficiency of the warrant--because the only information linking the illegal activity to the place to be searched, Miller's home, was stale. We agree with the trial court and affirm its suppression order.

I.

On January 6, 2003, the police obtained and executed a search warrant for Miller's home. During the search, the police discovered a methamphetamine laboratory, arrested Miller, and charged him with possessing and operating the lab.1

The warrant was based on a police affidavit reciting information from an anonymous informant. The informant

---

1 Based on the search of his home, the Amended Information charged Miller with manufacturing a schedule two controlled substance, possession of manufacturing chemicals or supplies, possession of a schedule II controlled substance, and unlawful possession of a schedule II controlled substance. § 18-18-405(1),(2)(a), 6 C.R.S. (2002). The prosecution also charged Miller with identical counts, based on the search of the residence of Miller's friend. The validity of this other search warrant is not before us.

said that, on December 9, 2002, at Miller's home, he smoked some methamphetamine Miller had just finished manufacturing there. The informant also stated that Miller kept methamphetamine manufacturing supplies in his kitchen cabinets. The affidavit also recited another informant's information--current at the time of application for this warrant on January 6, 2003--that Miller was manufacturing methamphetamine at a location other than his home. But the affidavit (attached as Exhibit A) contained no information more current than December 9, 2002,2 regarding manufacture or the presence of contraband at Miller's home.

The record made at the suppression hearing discloses that the police obtained and executed warrants for the other location and Miller's home on January 6, but the affidavit for search of the other location inexplicably contains more current information regarding manufacture of the drug by Miller at his home than was contained in the affidavit for search of his home.

As to the affidavit for search of Miller's home, the trial court found that: (1) the police had recited sufficient reliable information to implicate Miller in the manufacture of methamphetamine; (2) but the information regarding drug manufacturing by Miller at his home was stale; and (3) the police could not have reasonably relied on it in applying for the warrant. The trial court concluded that the warrant lacked probable cause, and the good faith exception to the exclusionary rule did not apply because no reasonably

---

2 On August 14, 2002, the police previously searched Miller's home pursuant to a warrant and seized evidence of methamphetamine manufacturing there.

objective police officer would have relied on the warrant's sufficiency. It therefore granted Miller's motion to suppress the evidence obtained from search of his home.

II.

We agree with the trial court that the warrant in this case was not based on probable cause, and the police could not have reasonably relied on it, because the information regarding drug manufacturing at Miller's home was stale when the police applied for the warrant, and no reasonable police officer would have relied on it. Accordingly, the exclusionary rule operates in this case, not the good faith exception to it.

A. Deficient Warrant and the Good Faith Exception

When reviewing a suppression order, we defer to the trial court's findings of facts, if supported by the record; and we review the trial court's legal conclusions de novo. People v. Schall, 59 P.3d 848, 851 (Colo. 2002); People v. D.F., 933 P.2d 9, 13-14 (Colo. 1997).

We address this case using the framework set forth by People v. Randolph, 4 P.3d 477, 482 (Colo. 2000), and People v. Altman, 960 P.2d 1164, 1167 (Colo. 1998). Randolph upheld a trial court's suppression order because the warrant there lacked probable cause and the police, under the circumstances in that case, could not have reasonably relied on it. In contrast, Altman applied the good faith exception and allowed the evidence to be admitted at trial, even though it was derived from execution of a warrant that may have lacked probable cause.

The application for the warrant in Randolph failed to particularize the building where the evidence of illegal

activity might be found; pertinent here, the anonymous tip received in that warrant was stale (two months old). We concluded that the police could not have reasonably believed that the "bare bones" affidavit they presented to the magistrate in that case established probable cause.

In contrast, the affidavit in Altman contained recent information the police had personally observed, suggesting a reasonable inference that the defendant was growing marijuana in his home.

> Officer Landolt's experience and training led him to believe that the purchase of equipment commonly associated with indoor marijuana cultivation at the height of the outdoor growing season, the high electrical usage, the potentially suspicious use of a rental car, and the defendant's previous brushes with the law all created a reasonable inference of marijuana cultivation.

Altman, 960 P.2d at 1172. Though the warrant may have lacked probable cause, an issue we did not reach because of the applicability of the good faith exception, we concluded that police reliance on the warrant in Altman was objectively reasonable.

The test for good faith reliance on the warrant imposes upon the officer involved in obtaining and executing the search warrant a continuing duty to exercise reasonable professional judgment. Randolph, 4 P.3d at 483. The officer must read the affidavit and warrant carefully and must be objectively persuaded that the warrant is sufficient. Id. In determining whether a reasonably well trained officer would

have known that the search was illegal despite the magistrate's authorization, a reviewing court should take all the circumstances surrounding the issuance of the warrant into account. Id.

As we did in Randolph, we now address the law of probable cause and the good faith exception for police reliance on a warrant. Then, we apply that law to the warrant and the seizure of evidence in this case.

B. Probable Cause

The Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution prohibit the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized. U.S. Const. amend. IV; Colo. Const. art. 2, § 7; see also § 16-3-303, 6 C.R.S. (2002) (specifying the requirements for a search warrant). Because there is no mechanical formula for determining probable cause, reasonable minds may differ on the question of whether a particular affidavit establishes probable cause. Altman, 960 P.2d at 1167. A reviewing court should uphold the validity of a warrant if the affidavit accompanying the warrant creates a substantial basis for the conclusion that probable cause existed. People v. Reed, 56 P.3d 96, 101 (Colo. 2002).

The warrant must establish probable cause to believe that contraband or evidence of criminal activity is located in the place to be searched at the time of the warrant application, not merely some time in the past. People v. Erthal, 194 Colo. 147, 570 P.2d 534 (1977). Probable cause exists when an affidavit for a search warrant alleges sufficient facts to warrant a person of reasonable caution to

believe that contraband or evidence of criminal activity is located at the place to be searched. Altman, 960 P.2d at 1167.

To determine whether probable cause exists, we examine the totality of the circumstances. Id. This analysis does not lend itself to mathematical certainties or bright line rules; rather, it involves a practical, common-sense determination whether a fair probability exists that a search of a particular place will reveal contraband or other evidence of criminal activity. Id.

Whether information is current or stale plays an important role in the totality of the circumstances analysis. See Randolph, 4 P.3d at 482; People v. Meraz, 961 P.2d 481, 484 (Colo. 1998); People v. Hearty, 644 P.2d 302, 311 (Colo. 1982); see also People v. Green, 70 P.3d 1213, 1215 (Colo. 2003) (warrant was obtained one day after the defendant was seen wearing the stolen item). Whether the information is stale and cannot support probable cause depends on the factual circumstances and the type of crime.3 People v. Lubben, 739 P.2d 833, 836 (Colo. 1987) ("In determining whether information is stale, the court must consider the type of crime the facts reveal.").

C. Good Faith Exception

Typically, when the police conduct a search without a valid warrant, the exclusionary rule operates to suppress the

---

3 The type of evidence and activity involved is important. Some types of evidence the police seek to obtain through a search warrant may be relatively immune from becoming stale, for example, DNA evidence at the specified location.

fruits of the search, unless the search falls under an exception to the warrant requirement. People v. Winpigler, 8 P.3d 439, 443-44 (Colo. 1999). The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the aggrieved; whether to invoke the exclusionary rule is an issue separate from the question of whether Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. United States v. Leon, 468 U.S. 897, 906 (1984). Application of the exclusionary rule is restricted to those areas where its remedial objectives are thought most efficaciously served. Id. at 908.

As a result, the exclusionary rule does not apply to situations where the police act in objectively reasonable, good faith reliance on a warrant, even if a court later holds that the warrant is defective. Randolph, 4 P.3d at 483. In such circumstances, excluding the fruits of the search would not have a deterrent effect on the police. Leon, 468 U.S. at 919-20.

The Colorado General Assembly has codified a version of the Leon test that permits admission of otherwise suppressible evidence if the evidence was seized "as the result of a good-faith mistake or of a technical violation." § 16-3-308(1), 6 C.R.S. (2002). The Leon "objectively reasonable" standard and the statutory "good faith" standard are substantially similar. Randolph, 4 P.3d at 483; People v. Leftwich, 869 P.2d 1260, 1272 (Colo. 1994). Colorado's statute, however, creates a presumption that an officer was acting in good faith if he or she acted pursuant to a warrant. See § 16-3-308(4)(b), 6 C.R.S. (2002); Randolph, 4 P.3d at 483. This presumption may be rebutted if the officer failed to undertake the search in an objectively good faith belief

that it was reasonable. Randolph, 4 P.3d at 483; Altman, 960 P.2d at 1169. If no reasonable officer would have relied upon the warrant, then objective good faith is absent and the good faith exception offers no shelter. Altman, 960 P.2d at 1169.

Accordingly, the police must act in objective good faith when they apply for the warrant; the fact that a magistrate ultimately approved the warrant is not controlling.

> [T]he fact that a magistrate acted favorably upon a warrant request is of no moment in the determination of whether the officer acted with objective reasonableness because the question of reasonableness is to be judged as of the time of warrant application and thus without consideration of the fact that the magistrate thereafter issued a warrant.

Leftwich, 869 P.2d at 1269 n.11 (emphasis added); accord Malley v. Briggs, 475 U.S. 335, 345 (1986) (the Leon analysis focuses on "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.")(emphasis added); see Altman, 960 P.2d at 1169 n.3.

There are four circumstances under which an officer may not reasonably rely on a warrant: (1) where the issuing magistrate was misled by a known or recklessly made falsehood; (2) where the issuing magistrate wholly abandoned the judicial role; (3) where the warrant is so facially deficient that the officer cannot reasonably determine the particular place to be searched or things to be seized; or

(4) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Leon, 468 U.S. at 923; Randolph, 4 P.3d at 483-84. We have characterized warrants that fall under the fourth circumstance as "bare bones" warrants. E.g., Randolph, 4 P.3d at 482.

This case implicates the fourth circumstance, because the trial court found that the information in the affidavit was stale, and, consequently, the police could not have reasonably believed that it established probable cause for the search of Miller's house.

D. Application In This Case

1. Lack of Probable Cause

A proper search warrant affidavit must allege sufficient facts to warrant a person of reasonable caution to believe that evidence of criminal activity is located at the place to be searched. Leftwich, 869 P.2d at 1265. Although the affidavit for the warrant in this case alleged past criminal activity at Miller's residence, it did not tie any current criminal activity or the presence of contraband to Miller's residence.

The affidavit for the warrant related information that Miller was engaged in a course of manufacturing methamphetamine, but the most recent event of affidavit-alleged criminal activity occurring at Miller's residence was nearly a month old at the time the police applied for the warrant. As the trial court found, the affidavit related two stale allegations of criminal activity at Miller's home: the fact that he was arrested there in August 2002 after the police found a methamphetamine lab on the premises, and the fact

that an anonymous informant on December 9, 2002, told the police he had smoked methamphetamine at Miller's house and observed Miller in the process of manufacturing a batch of methamphetamine.

Thus, the most recent evidence of criminal activity at Miller's residence was almost a month old when the police applied for the warrant on January 6, 2003. The affidavit contains no information indicating that the police attempted to ascertain whether Miller's illegal activity at his residence continued after the informant's visit, or to corroborate the informant's statements. The affidavit relates one unsuccessful attempt to verify that Miller continued to live at the house to be searched.4

Under these circumstances, the excessive delay between the informant's December 9, 2002 observations and the police application of January 6, 2003 for the warrant renders the information stale and unreliable. See Randolph, 4 P.3d at 482 (evidence that the defendant smoked methamphetamine at his house was stale, as it occurred "only some time in the last two months."); People v. Stoppel, 637 P.2d 384, 391 (Colo. 1981) (month-old observations by

---

4 The affidavit reports that a police officer went to the house and saw a vehicle registered to "James E. and Marsha L. Miller" parked at the residence. The affidavit provides no basis to believe that "James" Miller is the same person as "Wade" Miller. In addition, the affidavit does not state when the police made this observation, so the information is presumptively stale. See Randolph, 4 P.3d at 482 (affidavit's account of a witness statement is stale, because it did not include the time frames when the witness made his observations).

non-anonymous informant that the defendant had bomb making supplies in his residence were stale and insufficient to support probable cause).5

The current information contained in the affidavit about Miller's illegal drug manufacturing activity related to a different location from his home. The affidavit recites that on January 3, 2003, a few days before the police searched Miller's house, a different anonymous informant informed police that Miller was manufacturing methamphetamine at a trailer located elsewhere.6 The information from that informant related intimate and detailed knowledge of Miller's manufacturing activities and did not mention anything about Miller manufacturing the drug at his house, or storing it there. In fact, Miller was arrested and charged

---

5 People v. Erthal, 194 Colo. 147, 570 P.2d 534 (1977) is instructive on this point. In that case, the defendant was accused of stealing some tools from a former employer. The police observed similar tools in the defendant's shop shortly after the theft. However, they waited two months before obtaining and executing a warrant to search the defendant's shop. We held that this two-month-old observation was stale, and did not support probable cause. Id. at 535. "Due to the lapse of nearly two months between the deputy's observation . . . and the issuance of the warrant, there was no probable cause to believe that stolen goods were in the shop at the time the warrant was executed." Id.

6 This second informant also told the police that Miller was manufacturing at several other locations; however, the informant did not tell the police when Miller was manufacturing at those locations, so these additional allegations are stale.

for manufacturing methamphetamine at the other location as a result of the search conducted there pursuant to a separate warrant issued the same day as the warrant for search of his home. However, the warrant for search of Miller's home set forth nothing but stale information regarding manufacture at his home.

In contrast to the month involved here, our course of conduct cases address a much shorter time between the occurrence of criminal activity set forth as the basis for the warrant and the police application for the warrant. People v.Schmidt, 172 Colo. 285, 473 P.2d 698 (1970), involved evidence that a defendant was continuously dealing drugs from his room, and a lapse of five days between the time that an informant saw drugs in the room and the time that the police sought the warrant. Id. at 292, 473 P.2d at 701. Likewise, People v. Hearty, 644 P.2d 302 (Colo. 1982), involved a lengthy conspiracy to extort money, corroborated by a series of transactions over several months, with the final transaction occurring eight days before the police sought a search warrant. Id. at 311.

In People v. Ball, 639 P.2d 1078 (Colo. 1982), the police observed literally hundreds of suspected drug transactions at the defendant's residence, with the last transaction seven days before the police sought a warrant. Id. at 1080, 1083. Finally, in Lubben, 739 P.2d 833 (Colo. 1987), the affidavit involved a situation in which the police found methamphetamine in the defendant's residence in April; received additional information that the defendant possessed methamphetamine or drug paraphernalia in November and December of the same year; conducted "sporadic surveillance" of the defendant in December and observed unusually heavy foot traffic to and from the defendant's residence; and received a tip from an informant

that seventy-two hours before they applied for a search warrant, the informant saw methamphetamine in the defendant's residence. Id. at 836.

Here, the affidavit mentions two instances of illegal drug manufacture at Miller's house, one four months old and one nearly a month old. The mobility of this type of drug manufacturing is evident from the facts of this case. The affidavit recites that Miller was manufacturing methamphetamine at various places in the past. As our case law demonstrates, without relatively current information of criminal activity or contraband at the location to be searched, probable cause is typically lacking for issuance of the warrant.

The warrant for search of Miller's home lacked probable cause. We now address whether the good faith exception to the exclusionary rule should apply to this case.

2. Inapplicability of Good Faith Exception

In the vast majority of cases where a substantial basis for determining probable cause does not exist, the police cannot rely on the good faith exception:

> [I]n the vast majority of cases, if a court . . . ascertains that a substantial basis for determining probable cause did not exist, the court will reach the conclusion that the officer unreasonably relied on the affidavit.

Leftwich, 869 P.2d at 1271 n.12.

Application of the good faith exception to allow evidence that would be suppressed otherwise turns on

whether it was "objectively reasonable" for the officer to rely on the warrant. Id. Thus, police officers involved in obtaining and executing a search warrant have a continuing duty to exercise reasonable professional judgment. Randolph, 4 P.3d at 483; Altman, 960 P.2d at 1170. The good-faith exception requires officers to have a reasonable knowledge of what the law prohibits. Leon, 468 U.S. at 919 n.20.

The affidavit in this case is a "bare bones" affidavit regarding the existence of the crucial link between the place to be searched and current information of criminal activity or the presence of contraband there.7 Randolph, 4 P.3d at 482.

---

7 We emphasize that there is no bright line rule for counting of days in considering whether the affidavit is based on stale information. When the information in the affidavit focuses on one location, demonstrates ongoing activity over several months at that place, and the search warrant is for that place, courts have held that observations dating back more than one month were not stale. For example, the court in United States v. Iiland, 254 F.3d 1264, 1268-69 (10th Cir. 2001)(activity ongoing over a considerable period of time) pointed out that the "affidavit tended to show that Mr. Iiland kept the drugs he sold in the storage unit, and that he was still renting and visiting the unit a few days before the warrant was issued." Another court pointed out that "[n]othing suggested either that the conspirators would not continue in their operation or that the laboratory would be moved." United States v. Ruff, 984 F.2d 635, 638 (5th Cir. 1993). In United States v. Le, 173 F.3d 1258, 1266 (10th Cir. 1999), the reports of two informants were consistent in stating ongoing activity at the place to be searched. In contrast, the affidavit in the case before us placed the

As the trial court observed, the affidavit is bereft of current information about illegal activity at Miller's house:

> The "good faith" exception does not cure this deficiency. The affidavit is devoid of any information indicating current illegal activity at [Miller's house]. Official belief in the existence of information showing current illegal activity at [Miller's house] would be objectively unreasonable based on the information in the affidavit.

A reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence. Consequently, we agree with the trial court that the police did not reasonably rely on the warrant.

The prosecution urges us to consider information outside the affidavit to establish that the police met the objective good faith standard for admission of the seized evidence.8 This information was included in the affidavit to

---

ongoing drug manufacturing at a different location from the place to be searched.

8 The prosecution's brief to us argues that the officer who sought and executed the warrant acted in objective good faith, in part because "he possessed more knowledge of criminal activity at [Miller's house] than he stated in his warrant; to wit: that he personally spoke with another informant on December 20, 2002, who told him that Miller continues to manufacture methamphetamine in his home."

search the house of Miller's friend, or was discovered as a result of that search, and was "overlooked" in the affidavit for this warrant.9 However, like the trial court, we are restricted to the information contained within the four corners of the affidavit. See Reed, 56 P.3d at 101 (courts must consider whether reliance on the warrant was objectively reasonable, based on the contents of the warrant, and cannot inquire into the police's subjective good faith). Thus, we decline to bolster the insufficient affidavit in this case with additional information not conveyed to the magistrate in the application for this warrant.

(emphasis in original). People's Opening Brief at 8, People v. Miller, No. 03SA107.

9 For example, the warrant for the friend's house recites that an informant told the police on December 20 that Miller had continued to manufacture methamphetamine since his August arrest, and Miller primarily manufactures at his home and at his friend's residence. The People urge us to consider this information, arguing:

> A comparison of Officer Lopez's probable cause affidavit for the search of [Miller's residence] and Deputy Jolliffe's probable cause affidavit for the search of [Miller's friend's residence] clearly demonstrate that the two officers shared information
>
> and worked together in composing their affidavits. It is also clear that Officer Lopez simply overlooked stating an important detail when composing his affidavit. (emphasis added). People's Opening Brief at 6.

Given the facts of this case, applying the exclusionary rule to suppress the evidence seized has the salutary effect of requiring the police to use in the affidavit for the search warrant current information they have available, or may obtain, to establish the link between the place to be searched and the existence of criminal activity or contraband there. Establishing this link is at the heart of Fourth Amendment protections.

III. Conclusion

Accordingly, we affirm the trial court's suppression order and remand this case for further proceedings consistent with this opinion.

JUSTICE COATS dissents, and JUSTICE KOURLIS and JUSTICE RICE join in the dissent.

JUSTICE COATS, dissenting:

Today the court declares inadmissible, as the product of an illegal search, the physical evidence of the defendant's manufacture of methamphetamine in his home. The majority does so despite discovery of the evidence during the execution of a warrant to search the defendant's home, issued by a neutral magistrate, in reliance upon a three and one-half page, single-spaced, typewritten affidavit, and despite acknowledging a finding of sufficient reliable information in the affidavit to implicate the defendant in the manufacture of methamphetamine. Although the affidavit undeniably alleges observations of the defendant's continuous, and very recent, production of methamphetamine at a number of locations, the majority finds fatal to the search of his home the failure of the affidavit to document observations at that specific location for almost a month.

Because I believe the majority opinion betrays a fundamental misunderstanding of the purpose and scope of the staleness inquiry; amounts to a substantial departure from the precedent of not only this court but federal and state courts across the country; and evinces a general hostility toward the good faith exception to the exclusionary rule, I respectfully dissent.

Ordinarily, it would be enough for reversal of a suppression order that the search fell within the good faith exception to the exclusionary rule. People v. Altman, 960 P.2d 1164 (Colo. 1998). Because of the majority's staleness analysis, however, I feel obliged to explain why there was actually a substantial basis for the magistrate's finding of probable cause and issuance of the warrant. Although I do not consider the existence of probable cause to search the defendant's home a close question in this appeal, I do consider it important to emphasize that a warrant is not erroneously issued at all as long as there is at least a "substantial basis" to support it. People v. Gall, 30 P.3d 145, 150 (Colo. 2001).

While specific statutes or rules may impose formal time limitations on the execution of a search warrant, see, e.g., § 16-3-305(6), 6 C.R.S. (2002) (ten days from date of issuance); Crim. P. 41(d)(V)(VI) (same), the Fourth Amendment has never been construed to assign a life-span to information disclosing the commission of a crime. "Staleness" is simply a concept that expresses the reality that information making it likely that items connected to a crime will be found at a particular time and place may lose its force with the passage of time. Information amounting to probable cause to search for evidence of a crime at a particular point in time may therefore no longer amount to probable cause to search at a later point in time. Probable cause, however, "is

not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance." United States v. Rahn, 511 F.2d 290 (10th Cir. 1975). Rather, the likelihood that evidence of a crime will still be found in the same place is a function of a host of variables that are unrelated to the calendar. See Andresen v. State, 24 Md. App. 128, 331 A.2d 78 (Md. Ct. Spec. App. 1975). Chief among them is the nature of the criminal activity at issue.

Along with virtually every other jurisdiction considering the question, we have often acknowledged that the passage of time becomes less significant where information indicates criminal activity of a protracted or continuous nature. See, e.g., People v. Erthal, 194 Colo. 147, 570 P.2d 534 (Colo. 1977) ("There was no information that the suspect continuously engaged in criminal activity or continued to use feloniously obtained tools, factors which might have justified the belief that the stolen items would still be in the location searched."); United States v. Johnson, 461 F.2d 285 (10th Cir. 1972) (time has no meaning in determining probable cause apart from the nature and length of criminal activity and the nature of property to be seized). Time lapses running weeks, or even months, have been upheld where affidavits for search warrants indicated probable cause of ongoing criminal enterprises, of a wide variety. See generally 2 Wayne R. LaFave, Search & Seizure § 3.7(a), 344-46 nn. 17-26 (3d ed. 1996) (illegal paramilitary operations, gambling operations, ongoing fraud or loansharking operations, ongoing processing or repeated sales of drugs, liquor, or guns, repeated thefts or receipt of stolen property).

Especially with regard to illegal drugs, probable cause of ongoing sales and production has been expressly

distinguished from probable cause of mere use. Compare Andresen, ("The observation of half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in . . . .") with United State v. Hyde, 574 F.2d 856 (5th Cir. 1978) (holding in context of widespread and continuing conspiracy to smuggle drugs, "The upshot of this rule to practical application has been to allow fairly long periods of time to elapse between information and search warrant of criminal activity.") In light of the nature of the manufacturing or growing process and the nature of a conspiracy or enterprise to produce and/or sell drugs, information that is months old has regularly been held sufficient to establish probable cause to support a search. See, e.g., United States v. Iiland, 254 F.3d 1264 (10th Cir. 2001) (three months since cocaine sale); United States v. Smith, 266 F.3d 902 (8th Cir. 2001) (three months since cocaine sale); United States v. Ruff, 984 F.2d 635 (5th Cir. 1993) (two months since observation of meth lab); United States v. Dixon, 247 F. Supp. 2d 926 (S.D. Ohio 2002) (two months since cocaine sale); United States v. Seibert, 779 F. Supp. 366 (E.D. Pa. 1991) (three months since meth sale at defendant's trailer); Lovett v. Commonwealth, 103 S.W.3d 72 (Ky. 2003) (two months since observation of meth lab); State v. Hage, 568 N.W.2d 741 (N.D. 1997) (four months since supplier of meth lab ingredients named); State v. Wilson, 852 P.2d 910 (Ore. 1993) (six weeks since observation of meth lab); People v. Wilson, 227 Cal. Rptr. 528 (Cal. App. 6 Dist. 1986) (six weeks since observation of strong odor of meth).

The affidavit in this case indicated ongoing operations. It made clear that the affiant officer had already seized a meth lab from the defendant's home in August, as a result of which the defendant was charged with manufacturing and distributing and was released on bond. It

also contained detailed information from an informant who had been in the defendant's home in December, four months later, that the defendant was still regularly manufacturing methamphetamine at both his home and the Orchard location. The affidavit further contained detailed information from another informant from early January, just days before the issuance and execution of the warrant, that the defendant and another man were continuing to manufacture methamphetamine at the Orchard address, as well as several other locations. Unlike the majority, I consider it permissible to infer from this information that the defendant had not, in the last month, mysteriously stopped manufacturing methamphetamine at his home and removed all evidence of his operations there, while continuing to maintain all of his other operations.

Where the location to be searched is a suspected drug dealer's home, often no greater nexus to that specific location is required because experience dictates that drug dealers ordinarily keep their supply, records, and monetary profits at home. See generally 2 LaFave, at 379. It literally defies commonsense, where there is good reason to believe that the defendant (while out of jail on bond for doing the same thing) continues to use methamphetamine, to acquire a supply of the materials required for its manufacture, and in fact to manufacture the drug at a number of locations simultaneously; and where he clearly manufactured the drug in his home before being arrested and was observed still doing so at least four months afterward; to hold that there is not even a reasonable probability that his home has continued to be one of his manufacturing sites, or at least still contains evidence of his ongoing manufacturing operations. The majority's decision to limit the life-span of probable cause to a set number of days following the last information of drug manufacturing at a particular location is not only

contrary to our prior holdings but fails to appreciate the significance of being a continuing and ongoing operation.

While I am concerned about the majority's attempt to distinguish this case from our prior "course of conduct" cases on the grounds that we have not previously decided a case involving the same number of days between observation and issuance, see maj. op. at 14, I am much more concerned by its holding that no well-trained police officer could reasonably believe the information to still establish probable cause. The majority not only reduces the probable cause determination to a mechanical (if not arbitrary) counting process; it forces police officers to predict precisely where the court will draw the cutoff line. Even if it did not fly in the face of an abundance of counter-examples from courts across the country, this holding can only serve to encourage officers to rely on their own counting rather than the appropriate assessment of the nature and circumstances of the criminal activity by a neutral magistrate. Having a good faith exception serves little purpose if acting in good faith means nothing more than accurately predicting the ultimate conclusion of the courts.

The exception to the exclusionary sanction does not apply, nor should it, if the magistrate misbehaves or is misled by police misbehavior, or if the affidavit is so lacking in indicia of probable cause – is so "bare bones" – as to render official belief in its existence entirely unreasonable. In this case, the trial court did not apply the good faith exception because it believed that the month-long interval between observations of manufacturing in the defendant's home and issuance of the warrant not only rendered that information stale but made unreasonable any belief by trained officers that the affidavit contained probable cause for the search. In upholding that ruling, the majority in effect finds it

unreasonable for well-trained officers to rely on a probable cause determination by a neutral magistrate that would be upheld as fully justified by other justices of the jurisdiction's highest court.

The good faith exception to the exclusionary rule springs from the realization that the suppression of evidence as a sanction is unlikely to significantly modify executive branch behavior undertaken in objectively reasonable good faith. United States v. Leon, 468 U.S. 897 (1984). In addition to avoiding an extremely high cost to society, with little corresponding benefit, the exception has an additional salutary effect of promoting a judicial preference for warrants, by largely insulating executive branch officers from the mistakes of judicial magistrates. Not only does the majority's narrow interpretation nullify virtually any beneficial effect of the good faith exception; its unrealistic time and place restrictions on the probable cause determination severely undercut incentives to seek warrants in cases of ongoing methamphetamine operations. If delay by the police, in order to accumulate more and better information, is rewarded by disallowing information as stale, police will be faced with the dilemma whether to act on less information while it is more fresh, relying on the exigencies of the situation to excuse judicial approval in advance. Because I consider the majority holding to be wrong, both as a matter of law and as a matter of policy, and because I believe it will have a substantial negative impact on combating a serious social problem in this jurisdiction, I respectfully dissent.

I am authorized to say that JUSTICE KOURLIS and JUSTICE RICE join in this dissent.

Appendix A-1

STATE OF COLORADO)
) ss. AFFIDAVIT
COUNTY OF FREMONT)

In support of a request for the issuance of a SEARCH WARRANT FOR: 406 Riverside Drive, a yellow house with blue trim, located in the City of Canon City, County of Fremont, State of Colorado to search for Methamphetamine, ephedrine based pills, psudoephedrine based pills, drug paraphernalia, Methamphetamine lab equipment, precursor chemicals, money, records, weapons, receipts, and any other items that would relate to the use, possession, manufacturing, or trafficking of drugs.

THE UNDERSIGNED AFFIANT, BEING FIRST DULY SWORN UPON OATH, DEPOSES AND SAYS:

Your Affiant is Andrew J. Lopez, a Police Officer with the Canon City Police Department. I have been employed as a police officer for approximately seven years and am currently assigned to the narcotics investigations division of the Canon City Police Department. I have attended at least 192 hours of narcotics training involving the searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money. I have also experienced first hand searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money.

On December 12th, 2002 I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she had information regarding the manufacture of methamphetamine in Canon City. Agent Fritz advised the following:

- She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area
- They stopped the two persons at a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe
- One of the two persons, wishing to remain anonymous, told her the following:

  - On Monday, December 9th, 2002, they were in Wade Miller's house, 406 Riverside Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine in the house
  - They smoked some methamphetamine with Wade, which he had just manufactured
  - Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt
  - Wade's batch of methamphetamine was "salting out"
  - Wade drive's [sic] a Blue Ford Bronco
  - Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house
  - They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine
  - Wade Miller has also been cooking at an address on Orchard, at the entrance to Mountain View Park, in the last trailer to the East
  - The trailer belongs to Valerie Shetrone and a man named Nick (last name unknown)

- Valerie and Nick allow Wade and Jacob Lopez to manufacture methamphetamine in the trailer
- The trailer has an addition to the rear with some sort of aluminum cover over it
- Jacob Lopez has been recently arrested, but Wade continues to manufacture in the trailer
- Approximately 2 weeks ago they personally observed Sudafed pills, Xylol, a "bubbler," Red Devil Lye, Tubing, and Glassware in this trailer home
- Wade has been regularly manufacturing methamphetamine at either the Riverside or the Orchard address

Agent Fritz went on to say the second person arrested, wishing to remain anonymous, offered Jim Sampson's current location, stating that Jim was at the Econo Lodge on the North end of Pueblo, and had a warrant for his arrest.

I advised Canon City Police Department Detective Jeff Worley of the information I received. Detective Worley identified the Orchard address as 926 Orchard, with a trailer number believed to be #C, and described it as two White trailer houses with Brown trim, connected by some kind of walkway between the two, with a round metal building attached on the North side. Detective Worley found one car parked at the trailer, bearing Colorado license plate number 629CRH, which came back to a Claudia J. Shetrone and a Valeria R. Holtz of 926 Orchard Avenue. Detective Worley also went to 406 Riverside where he found an 85 Ford 2 door, bearing Colorado license plate number NOVLU, which came back to James E. and Marsha L. Miller. Detective Worley indicated that there were several people around the property at the time he went by.

I recognized all the chemicals and terms referred to by the first anonymous party as being integral parts of the methamphetamine manufacturing process. I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in his home on August 14th, 2002. I also know Jacob Lopez was arrested following the seizure of this meth lab, when he approached 406 Riverside and was found to have methamphetamine and paraphernalia with him. I also know Jim Sampson was wanted on a warrant for manufacturing meth at his shop at 2027 South Street, located [sic] on November 22nd, 2002. I recalled Wade Miller's Criminal History and knew he was arrested in Canon City 1992 [sic] for 2 counts of Distributing Marijuana, and Distribution of Dangerous Drugs (Methamphetamine).

On January 3rd, 2002 [sic] Fremont County Sheriff's Deputy Mike Joliffe spoke to a person, wishing to remain anonymous, who advised the following:

- Wade Miller 05/25/64 is driving a navy blue, Ford, Bronco
- Wade Miller and Jacob Lopez manufacture methamphetamine together
- Jeff West owns a fake penis that has a fake bladder, that West, Jacob Lopez and Wade Miller use to pass urinalysis test [sic] as part of the M.A.P.P. program
- Wade Miller uses his boss's credit card to purchase urine from an online business through the internet
- Wade Miller and Jacob Lopez use a trailer located on Orchard Avenue in Canon City. This trailer is next to Mountain View Park. The trailer has a metal rounded building located at the back of the trailer
- The trailer they use to manufacture methamphetamine

belongs to Nick Bufmack

- Bufmack stated to Miller, that it is ok to make meth in the trailer, but he wants to know when they are doing it
- Bufmack has a girlfriend named Val (the only name this person has ever heard her called)
- Val has a mother that lives in the area of the trailer and has in the past reported smelling strange smells coming from the area
- Recently the police responded to one complaint of the smell and Jacob Lopez was hiding in the trailer until they left
- A person by the name of Jim Woldridge purchases the chemicals and ephedrine based pills for Wade Miller
- Wade Miller manufactures methamphetamine on Friday nights, but only if he has at least 1000 ephedrine based pills to cook with
- Wade Miller in the past has gone to a home in Florence that belongs to Cindy and Rod Steele
- Miller and Rod would manufacture methamphetamine in the shed on the property
- Rod has anhydrous ammonia tanks buried in the back yard
- Wade Miller's brother Chuck Miller and his girlfriend/wife with a last name of Washburn, will go to Salida and Denver to purchase Ephedrine based pills for Wade
- Chuck and Washburn live on some property up in Tallahassee
- Wade will go up on the property on occasion to manufacture methamphetamine
- Wade has anhydrous ammonia tanks buried on the property
- Wade is sharing anhydrous ammonia tanks with John

Messer

- Messer lives in Williamsburg.

On this same date Fremont County Sheriff's Deputy Jay Dexter arrested Wade Miller for driving under revocation. Miller was arrested driving a blue, Ford, Bronco that registered to Harmony Britton. I arrested Harmony Britton for possession of Methamphetamine after she approached 406 Riverside following the seizure of the meth lab at the residence on August 14th, 2002.

I recognized all the chemicals and terms referred to by the first anonymous party as being integral parts of the methamphetamine manufacturing process. I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in his home on August 14th, 2002. I have received several anonymous tips since Wade Miller bonded out that he has continued to manufacture and sell methamphetamine. I also arrested Jacob Lopez following the seizure of this meth lab, when Jacob approached 406 Riverside there was methamphetamine and paraphernalia on his person.

Wade Miller's Criminal History shows the following:

1992 arrested for marijuana distribution and distribution of dangerous drugs.
1994 arrested for DUI.
2002 arrested for distribution and manufacturing of schedule II, possession of schedule II, possession of narcotic equipment, driving under the influence of drugs, marijuana and unlawful manufacturing of schedule II.

I know the anonymous person that spoke to Deputy Jolliffe is not the same as the anonymous person I spoke to, because they are of different genders.

Subscribed and sworn before me this 6th Day of January, 2003.

APPENDIX B

COMBINED COURTS CASE NO.SEARCH WARRANT
COUNTY OF FREMONT
STATE OF COLORADO
AGENCY CASE NUMBER: 2024175

THE PEOPLE OF THE STATE OF COLORADO

TO: THE SHERIFF, UNDERSHERIFF, DEPUTY SHERIFF, AND ALL LAW ENFORCEMENT OFFICERS OF FREMONT COUNTY, COLORADO, GREETINGS:

WHEREAS, Officer Andrew J. Lopez of the Canon City Police Department, has made an Affidavit and Complaint for the issuance of a Search Warrant.

AND WHEREAS, the Affidavit of the applicant seems proper and it appears that probable cause exists for the issuance of a Search Warrant for the reason or reasons marked with a "X" below:

The property to be searched for, and seized if found is:

( ) Stolen or embezzled OR
(XX) Designed or intended for use or which is or had been used as a means of committing a criminal offense or the possession of which is illegal, OR
(XX) Would be material evidence in a subsequent criminal prosecution.

WE THEREFORE COMMAND YOU, with the necessary and proper assistance, to enter and search 406

(b2)

Riverside Drive, its outbuildings, its property, and vehicles present, located in Canon City, Fremont County, Colorado, to search for Methamphetamine, ephedrine based pills, pseudoephedrine based pills, drug paraphernalia, Methamphetamine lab equipment, precursor chemicals, money, records, weapons, receipts, any other items that would relate to the use, possession, manufacturing, or trafficking of drugs, and if the same or any part thereof is found. that you seize the goods and things found and safely keep them until further order of this court or until they are admitted into any criminal proceedings conducted by a Court of this State; and that you further file a report with this Court inventorying the goods and things which were found and seized or reporting nothing was so found and seized. 406 Riverside Drive is a yellow house with blue trim.

DONE this 6th day of January, 2003.

(b3)

STATE OF COLORADO)
)ss. AFFIDAVIT
COUNTY OF FREMONT)

In support of a request for the issuance of a SEARCH WARRANT FOR: 406 Riverside Drive, a yellow house with blue trim, located in the City of Canon City, County of Fremont, State of Colorado to search for Methamphetamine, ephedrine based pills, pseudoephedrine based pills, drug paraphernalia, Methamphetamine lab equipment, precursor chemicals, money, records, weapons, receipts, and any other items that would relate to the use, possession, manufacturing, or trafficking of drugs.

THE UNDERSIGNED AFFIANT, BEING FIRST DULY SWORN UPON OATH, DEPOSLS AND SAYS:

Your Affiant is Andrew J. Lopez, a Police Officer with the Canon City Police Department. I have been employed as a police officer for approximately seven years and am currently assigned to the narcotics investigations division of the Canon City Police Department. I have attended at least 192 hours of narcotics training involving the searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money. I have also experienced first hand searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money.

On December 12th, 2002, I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she had information regarding the manufacture of methamphetamine in Canon City. Agent Fritz advised the

following:

- She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area
- They stopped the two persons on a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe
- One of the two persons, wishing to remain anonymous, told her the following:

- On Monday, December 9th, 2002, they were in Wade Miller's house, 406 Rive~side Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine at the house
- They smoked some methamphetamine with Wade, which he had just manufactured D Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt Wade's batch of methamphetamine was "salting out"
- Wade drives a Blue Ford Bronco
- Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house
- They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine
- Wade Miller has also been cooking at an address on Orchard, at the entrance to Mountain View Park, in the last trailer to the East
- The trailer belongs to Valerie Shetrone and a man named Nick (last name unknown)
- Valerie and Nick allow Wade and Jacob Lopez to manufacture methamphetamine in the trailer
- The trailer has an addition to the rear with some sort of aluminum cover over it
- Jacob Lopez has been recently arrested, but Wade continues to manufacture in the trailer

- Approximately 2 weeks ago they personally observed Sudafed pills, Xylol, a "bubbler", Red Devil Lye, Tubing, and Glassware in this trailer home
- Wade has been regularly manufacturing methamphetamine at either the Riversic or the Orchard address

Agent Fritz went on to say the second person arrested, wishing to remain anonymous, offered Jim Sampson's current location, stating Jim was at the Econo Lodge on the North end of Pueblo, and had a warrant for his arrest.

I advised Canon City Police Department Detective Jeff Worley of the information I received. Detective Worley identified the Orchard address as 926 Orchard, with a trailer number believed to be #C, and described it as two White trailer houses with Brown trim, connected by some kind of walkway between the two, with a round metal building attached on the North side Detective Worley found one car parked at the trailer, bearing Colorado license plate number 629CRH, which came back to a Claudia J. Shetrone and a Valeria R Holtz of 926 Orchard Avenue. Detective Worley also went to 406 Riverside where he found an 85 Ford 2 door, bearing Colorado license plate number NOVLU, which came back to James E. and Marsha L. Miller. Detective Worley indicated there were several people around the property at the time he went by.

I recognized all the chemicals and terms referred to by the first anonymous party as being integral parts of the methamphetammine manufacturing process. (I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in

his home on August 14th , 2002. I also know Jacob Lopez was arrested following the seizure of this meth lab, when he approached 406 Riverside and was found to have methamphetamine and paraphernalia with him I also know Ji; Sampson was wanted on a warrant for manufacturing meth at his shop at 2027 South Street, located on November 22nd, 2002. I recalled Wade Miller's Criminal History and knew he was arrested in Canon City 1992 for 2 counts of Distributing Marijuana, and Distribution of Dangerous Drugs (Methamphetamine).

On January 3, 2002 Fremont County Sheriffs Deputy Mike Joliffe spoke to a person, wishing to remain anonymous, who advised the following:

- Wade Miller 05/25/64 is driving a navy blue, Ford, Bronco
- Wade Miller and Jacob Lopez manufacture methamphetamine together
- Jeff West owns a fake penis that has a fake bladder, that West, Jacob Lopez and Wade Miller use to pass urinalysis test as part of the M.A.P.P. program
- Wade Miller uses his boss's credit card to purchase urine from an online business through the internet
- Wade Miller and Jacob Lopez use a trailer located on Orchard Avenue in Canon City. This trailer is next to the Mountain View Park. The trailer has a metal rounded building located at the back of the trailer
- The trailer they use to manufacturer the methamphetamine belongs to Nick Bufmack
- Bufmack stated to Miller, that it is ok to make meth in the trailer, but he wants to know when they are doing it

(b7)

- Bufmack has a girlfriend named Val (the only name this person has ever heard her called)
- Val has a mother that lives in the are of the trailer and has in the past reported smelling strange smells coming from the area
- Recently the police responded to one complaint of the smell and Jacob Lopez was hiding in the trailer until they left
- A person by the name of Jim Woldrige purchases the chemicals and ephedrine based pills for Wade Miller
- Wade Miller manufactures methamphetamine on Friday nights, but only if he had a least 1000 ephedrine based pills to cook with
- Wade Miller in the past has gone to a home in Florence that belongs to Cindy and Rod Steele
- Miller and Rod would manufacturer methamphetamine in the shed on the property
- Rod has anhydrous ammonia tanks buried in the back yard
- Wade Miller's brother Chuck Miller and his girlfriend/wife with a last name of Washburn, will go to Salida and Denver to purchase Ephedrine based pills for Wade
- Chuck and Washburn live on some property up in Tallahassee
- Wade will go up on the property on occasion to manufacture methamphetamine
- Wade has anhydrous ammonia tanks buried on the property

- Wade Miller is sharing anhydrous ammonia tanks with John Messer
- Messer lives in Williamsburg

On this same date Fremont County Sheriff's Deputy Jay Dexter arrested Wade Miller for driving under revocation. Miller was arrested driving a blue, Ford, Bronco that registered to Harmony Britton. I arrested Harmony Britton for possession of Methamphetamine after she approached 406 Riverside following the seizure of the meth lab at the residence on August 14, 2002.

I recognized all the chemicals and terms referred to by the first anonymous parry as being integral parts of the methamphetamine manufacturing process. I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in his home on August 14', 2002. I have received several anonymous tips since Wade Miller bonded out that he has continued to manufacture and sell methamphetamine. I also arrested Jacob Lopez following the seizure of this meth lab, when Jacob approached 406 Riverside there was methamphetamine and paraphernalia on his person.

Wade Miller's Criminal History shows the following:

- 1992 arrested for marijuana distribution and distribution of dangerous drugs.
- 1994 arrested for DUI.
- 2002 arrested for distribution and manufacturing of schedule II, possession of schedule II, possession of narcotic equipment, driving under the influence of drugs, marijuana and unlawful manufacturing of schedule H.

(b9)

I know the anonymous person that spoke to Deputy Jolliffe is not the same as the anonymous person I spoke to, because they are of different genders.

Further your Affiant sayeth naught

_____

Affiant

Subscribed and sworn before me this 6th day of January, 2003.

APPENDIX C

DISTRICT COURT, FREMONT COUNTY COMBINED COURTS 136 JUSTICE CENTER ROAD, ROOM 103 CANON CITY, COLORADO 80212	
THE PEOPLE OF THE STATE OF COLORADO, v. WADE MILLER, DEFENDANT.	▲ **COURT USE ONLY** ▲
Prepared by the Court: Fremont County, State of Colorado 136 Justice Center Road, Room 103 Canon City, CO 81212	Case No.: 03CR11 Division 2 Courtroom 301
ORDER	

This matter comes before the Court upon a Motion to Suppress the evidence obtained from 406 Riverside Drive, Canon City, Colorado. The Court has considered the arguments and authorities cited. The Motion is granted.

The Affidavit dated January 2, 2002 clearly establishes probable cause to believe Wade Miller was manufacturing methamphetamines. However, it fails to establish probable cause that it was occurring at 406 Riverside. The only information in the affidavit related to 406 Riverside is:

"On December 12, 2002, I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she

had information regarding the following:

> She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area

They stopped the two persons on a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe

One of the two persons, wishing to remain anonymous, told her the following:

- On Monday, December 9, 2002, they were in Wade Miller's house, 406 Riverside Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine at the house
- They smoked some methamphetamine with Wade, which he had just manufactured Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt

Wade's batch of methamphetamine was "salting out"

- Wade drives a Blue Ford Bronco
- Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house
- They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine"

Also, the affidavit mentions several times that a search warrant was executed at 406 Riverside on August 14,

2002 and numerous people were arrested at that home when a methamphetamine lab was located there. The District Attorney argues that the information in the affidavit is not stale because it shows a continuing course of conduct or, alternatively that even if the information is insufficient, the good faith exception applies. (§ 16-3-308, 6 C.R.S. (2002)).

In support of her argument that the information was not stale, the District Attorney cites People v. Reed, 56 P.3d 96 (Colo. 2002), People v. Lubben, 739 2 P.2d 833 (Colo. 1987), and United States v. Mascarenas, 30 Fed. Appx. 784, 2002 WL172685 (l0th Cir. Colo.). Each of these cases has more compelling facts than are contained in this case. In Reed, in support of the search warrant for Room 12 requested on November 6, 2001 the Court notes the affidavit stated the Defendant moved from one motel room (Room 3) where remnants of a methamphetamine lab had been found to room 12 of the same motel on November 4, 2001, that the Defendant was seen smoking outside Room 12 two days prior to the search, which is a common practice for methamphetamine manufacturers to avoid igniting vapors and that a few days prior to the search request an empty acetone container and ephedrine was found in Reed's vehicle. In Lubben, which does discuss a continuing series of illegal activities, the court notes the affidavit should be read as indicating that during the month preceding the application for the warrant, officers conducted "sporadic surveillance" and observed heavy foot traffic consistent with drug trafficking, between the two residences, and within 72 hours of the search the Confidential informant observed methamphetamine at one of the addresses. In Mascarenas, in addition to reflecting ongoing and continuous drug activity the affidavit also showed recent drug activity at

the places to be searched. These cases do not support the issuance of a warrant in this case where the only information tying the methamphetamine lab to the Riverside address is approximately one month prior to the application for the warrant with subsequent investigation yielding no additional information as to that residence but rather information as to a different address. People v. Randolph, 4 P.3d 477 (Colo. 2000)

The "good faith" exception does not cure this deficiency. The affidavit is devoid of any information indicating current illegal activity at the Riverside address. Official belief in the existence of information showing current illegal activity at the Riverside address would be objectively unreasonable based on the information in the affidavit. (People v. Altman, 960 P.2d, 1164 (Colo. 1998.) Therefore the Motion to Suppress is granted. The evidence seized pursuant to this affidavit may not be used by the prosecution in support of criminal charges.

BY THE COURT:

_____

Julie G. Marshall, Judge